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Veröffentlichungsversion / Published Version
Stellungnahme / comment

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Empfohlene Zitierung / Suggested Citation:

Zilla, C., & Schreiber, F. F. N. (2020). *The constitutional process in Chile: the South American country is searching for a new social contract*. (SWP Comment, 17/2020). Berlin: Stiftung Wissenschaft und Politik -SWP- Deutsches Institut für Internationale Politik und Sicherheit. <https://doi.org/10.18449/2020C17>

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SWP Comment

NO. 17 APRIL 2020

The Constitutional Process in Chile

The South American Country Is Searching for a New Social Contract

Claudia Zilla and Franziska F. N. Schreiber

The protests in Chile, which began in October 2019, have resulted, among other things, in a constitutional initiative, which citizens had been demanding for a long time. Government and opposition parties have now agreed to it. It is supposed to begin with a referendum on whether a new constitution is desired and which collective body should elaborate it. Since 26 February, Chile has officially been engaged in the election campaign for this referendum. Due to the Covid-19 pandemic, it has been postponed from 26 April to 25 October. The potential election of the constituent body is now scheduled for 11 April 2021. It is still uncertain to what extent a new constitution will contribute towards overcoming this social, political, and institutional crisis. Nevertheless, the vast majority of the population believes that it is an indispensable cornerstone for a necessary new social contract.

The social mobilisation since October 2019 has revealed a shocking picture of societal relations in Chile — not only deep dissatisfaction, but also strong resentment and great anger have emerged. The wake-up call (*Chile despertó*) has been a nightmare for the political elite, and the ongoing violent riots continue to challenge them. President Sebastián Piñera, who was in office from 2010 to 2014 and has been again since 2018, initially reacted with short-term concessions. In 2019, he made changes in his cabinet and announced a “social agenda”: In the future, more money would flow into the health, pension, and education systems. In addition, Piñera sought a constitutional way out of the crisis, together with the government and opposition parties. It is supposed to take into account the demands for

a new constitution that have been repeatedly voiced since 2011 as well as the lively debates that took place in the course of the protests in neighbourhood meetings (*cabildos* and *asambleas*) organised by civil society. Despite these policy measures, around 81 per cent of those interviewed in a nation-wide survey conducted by the opinion research institute Activa at the end of February 2020 viewed Piñera’s leadership negatively.

The “Pinochet Constitution”

Chile’s current constitution dates back to 1980, and thus to the time of the military dictatorship, and therefore it is often considered the legacy of General Augusto Pinochet. Thus, it lacked democratic legiti-



macy (*legitimidad de origen*) from the outset. The constitution was drawn up by a commission (*Comisión Ortúzar*) appointed by the government and consisted of seven men and one woman. It was ratified on 11 September 1980 with 68.5 per cent of the valid votes cast in a plebiscite, which of course took place under autocratic conditions.

After the regime change, the original text of the “Pinochet Constitution” underwent significant democratising changes under the centre-left coalition governments of the *Concertación*, especially in 2005 under the presidency of Ricardo Lagos. Thanks to the successive reforms, the so-called authoritarian enclaves (i.e. privileges granted to certain actors and bodies that restricted pluralist political competition) were largely abolished in a gradual manner. Nevertheless, this constitution, which has been revised several times, is now regarded less as an anchor of democratic stability than as a safeguard of a rigid, elite democracy. It consolidates the status quo, for example by means of high quorums required for constitutional reforms and a series of legislative initiatives.

During her second presidency, Michelle Bachelet (2006–2010 and 2014–2018) responded to the ever-louder calls for a completely new constitution. As promised during her election campaign, she initiated a national, participatory, and institutional constitutional process. Public discussions were held at all state levels. Their results were compiled and systematised in a final document (*Bases Ciudadanas del Proceso Constituyente para una Nueva Constitución*). On this basis, members of the government drew up a constitutional project, which President Bachelet submitted to Congress on 6 March 2018, a few days before the transfer of office. Due to the change of power, however, it was not pursued further. The protests at the end of 2019 built up so much social pressure that the parties of the centre-right coalition government finally also agreed to draft a completely new constitution.

The Chileans attach different expectations to the constitutional process, which should mark the final farewell to the “Pino-

chet Constitution” and thus initiate a new, *fully democratic* era. At the same time, it should provide the framework for a renewed social and political understanding. Finally, it is intended to recognise extended rights and create the regulatory foundation for coping with the most urgent problems.

The Multiparty Agreement

On 15 November 2019, ten political parties from the government and the opposition (Evópoli, P. Comunes, PDC, PL, PPD, PR, PS, RD, RN, UDI) signed an “Agreement for Social Peace and the New Constitution”. Only the Communist Party and the centre-left party FREVS refused to join the covenant that initiated a constitutional process and arranged the formation of an accompanying technical committee (*Comisión Técnica Asesora del Proceso Constituyente*). The points agreed upon came into force through congressional resolutions and an Executive Decree (Decree No. 2,445 of 27 December 2019).

Chilean citizens are called upon to answer two questions in a referendum (the entry plebiscite): firstly, whether they want a new constitution, and secondly, whether it should be drafted by a Mixed Constitutional Convention (MCC, *Convención Mixta Constitucional*) or a Constituent Assembly (CA, *Convención Constitucional*). For each question, the option that receives more than 50 per cent of the valid votes prevails.

The main difference between the two constituent collective bodies lies in their composition. The MCC would consist of 172 members – half of them being members of Congress and half being citizens. The former would be elected in a parliamentary plenary session, the latter directly by the people, according to the rules that apply to the election of representatives. Members of Congress who manage to enter the MCC do not lose their parliamentary mandate but are merely exempted from attending committee and plenary sessions. In contrast, the CA would be composed of 155 members who are directly elected by

the people. For the directly elected members of the Convention and the Assembly, the rule banning the concurrent holding of office and mandate applies. Even after having completed their constitutional work, members are not allowed to take up positions in politics or in the administration for one year. On 4 March 2020, the Chilean Congress passed an additional law (Law No. 21.216) that prescribes gender parity for non-parliamentary — that is, directly elected — candidates.

Parliamentary and non-parliamentary members of the Convention and the Assembly are compensated different amounts. Respectively, they continue to receive their parliamentary allowances of 9.3 million Chilean pesos (around 9,850 euros) per month, or a salary of 2.5 million Chilean pesos (around 2,650 euros) per month.

A number of restrictive provisions that even required a modification of the current constitution with regard to the reform mechanism were already laid down by law (Law No. 21.200) on 23 December 2019. The MCC and the CA take decisions with a two-thirds majority — a quorum that may not be changed. Furthermore, the MCC and the CA must preserve Chile's republican form of government and democratic regime as well as guarantee compliance with final court rulings and ratified international treaties. The constitutional work of the Convention or the Assembly must not exceed a period of nine months, with the possibility of a one-off, three-month extension. The new constitutional text is to be ratified 60 days after its completion by means of another referendum — the exit plebiscite — for which voting is compulsory. The current constitution is to be completely replaced and automatically overridden by a new constitutional text (*derogación orgánica*). If no new constitutional text is adopted, the old constitution remains in force.

Trends and Issues

According to a survey conducted by Activa at the end of February 2020, the vast major-

ity of respondents are in favour of a new constitution. However, since November 2019, the percentage of those in favour has fallen from 82.3 to 73.5 per cent. In addition, 72.3 per cent of those surveyed intend to participate in the entry plebiscite, which is non-compulsory for the citizens but binding for the government. At the same time, citizens are clearly in favour of an entirely directly elected CA (51.2 %) instead of an MCC (24.4 %).

Citizens' preference for a CA is explained by its underlying principle of equality: All members are directly elected according to gender parity and receive an identical salary. Besides, the lack of participation by civil society is cited as an argument against the election of Convention or Assembly members via party lists, just as with the lack of explicit inclusion of disadvantaged social groups. Although the (highly discredited) political parties can integrate renowned personalities or independent candidates into their lists, they retain organisational autonomy and authority over the election process.

As far as constitutional content is concerned, the extension of social, economic, cultural, and collective rights with constitutional status is one of the central, historically significant demands of civil society. Against the background of an extremely traditional, conservative culture with pronounced gender injustice, there is a plea for gender equality, the recognition and protection of minorities — as well as their participation rights — to be enshrined in the constitution, also in relation to the indigenous communities (such as *mapuches*).

The role of the state, which is currently purely subsidiary, is to be redefined and extended through the inclusion of relevant socio-economic duties. This approach would significantly change the relationship between the state and the market: Currently, the state is regarded as having been *captured* by economic interests, and the market is the main mechanism for resource allocation, even in social areas such as pensions, health, education, and social housing. With regard to their links to the economy, there

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ISSN 1861-1761
doi: 10.18449/2020C17

(English version of
SWP-Aktuell 23/2020)

is also a call for politicians to improve transparency and *accountability* vis-à-vis the citizens. Those who advocate for the building of a welfare state hope that this development will reduce inequality and validate the guiding idea of people as “citizens” rather than as “customers” or “clients”.

Among the more academic debates is the proposal to lower the high majorities (*quorum supermajoritario*) required for certain types of laws. Nowadays, depending on the case, it is two-thirds, three-fifths, or four-sevenths, giving the political minority a veto power and fostering the reform backlog. Moreover, the “preventive control” exercised by the Constitutional Court is heavily criticised. Because of its composition and powers, this control is considered as the last bulwark of the right-wing conservative minorities in their efforts to thwart undesirable reform initiatives that find approval in Congress and the executive branch.

Regarding the positions of the political parties, those from the centre-left and left of the spectrum tend to support reforms that can expand (participatory) rights and strengthen the state. Parties that can be located right of centre tend to take a more conservative stance on the old constitutional text. However, there are also lines of conflict that run counter to these ideological positions, as with those concerning the relationship between the executive and the legislative. For example, there is dissent between parties that have a chance of holding the presidency and those that see themselves more as parliamentary actors.

Chile in the Regional Context

Chile is about to embark on the road towards a *new* constitution. This road has been impeded by change-averse elites, high legal and institutional hurdles for reforms, as well as loyalty towards the “Pinochet Constitution”, whose origin is illegitimate,

but which has been treated as legal. A comparative look at the constitutional processes in Venezuela (1999), Bolivia (2006/07), and Ecuador (2007/08) has also had a discouraging effect.

Thus, over the past three decades, Chile has remained an island of constitutional pertinacity, whereas substantial constitutional reforms or new constitutions have been introduced by ad hoc collective bodies in numerous countries in the region (such as Brazil in 1988, Colombia in 1991, Peru in 1993, and Argentina in 1994). For a long time, Chile stood out for being politically very stable. In the end, this stability turned to rigidity and broke apart in 2019.

Changes in cost calculations made it possible to reach a multiparty agreement on a constitutional process. The crisis of legitimacy and trust in which Chile's political system now finds itself cannot be overcome without a collective act that creates community and symbolises political renewal. However, the fact that the society is longing for a new beginning does not necessarily mean that it will dare to bring about far-reaching political change.

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